63978-1

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NO. 63978-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

GARY FILION, Plaintiff/Respondent

v.

JULIE JOHNSON, et al., Defendant/Appellant

# RESPONDENT'S BRIEF

Noah Christian Davis
WSBA #30939
Attorney for Respondent

In Pacta PLLC
801 2nd Ave
Suite 307
Seattle, WA 98104
PH: (206) 734-3753

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

### Table of Cases

**Statutes**

**Rules**

## I. STATEMENT OF THE CASE

Julie Johnson's Appeal arises from the voluntary dismissal of a Complaint that had been filed by Plaintiff Gary Filion against Defendant/Appellant Julie Johnson on 2/21/07.[1] (CP 1-4, Complaint). Filion's underlying action was based, inter alia, on false arrest, malicious prosecution, negligent misrepresentation and (negligent infliction of) emotional stress claim stemming from Julie Johnson's efforts to have Filion charged with violation of a restraining order contained in a divorce decree. (CP 11-12, Second Amended Complaint, at CP 12, lines 9-17) Filion's underlying Complaint alleges that Appellant Johnson had called the police after Mr. Filion had arrived at the marital home to pick up his remaining personal property at a pre-arranged time and date – a date that had been pre-arranged by the Parties' attorneys in accordance with the divorce decree and on the last day before the marital house was to turned over to a third party as part of a sale. (CP 1-4, 19-28, Decl. of M. Olson).[2]

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[1] The Mark and Leslie Olsen (of the Olsen and Olsen law firm) were one-time defendants who were later dismissed. (CP 91, 397-399)

[2] The divorce decree contained both a restraining order and language requiring Mr. Filion to go and pick up his remaining separate property from the marital home. (CP 178-180) And in fact, Johnson was supposed to have already been moved out by then. (CP 165-175). When Filion arrived at the marital home, a friend of Johnson told him that he must leave or they would call the police. (CP 176-177 Decl of Gary Filion). Filion went back to his car, called his attorney, and then left the premises without having collected his personal belongings and without any knowledge as to whether he would ever get them. (CP 176-177Decl. of Gary Filion). Thereafter, Johnson filed criminal charges against Filion for violation of the restraining order. (CP 11-12). Fortunately, after Filion hired a criminal defense attorney and the truth was shown to the prosecuting attorney, the



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

The case progressed to mandatory arbitration, but after disagreeing with the result, Johnson requested a trial de novo. (CP 110-111, 189-190, 321-323, 324-325; MAR 7.1 and RCW 7.06.050). Shortly after the request for a trial de novo, Filion moved for a voluntary dismissal of his action under Civil Rule 41(a). (CP 333-338, 358-365).[3] Upon the Court granting the dismissal, Johnson filed her notice of appeal in an attempt to have this Court reverse the trial court, reinstate Filion's case against her and force Filion to take the case to trial so that Johnson could try and seek to obtain sanctions or attorney fees (or both) against Filion under the anti-SLAPP Act (RCW 4.24.500-510).

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charges were dropped. (CP 11-12). But because he had expended time and money defending the criminal complaint made against him, Filion chose to file suit to recoup the monies that he had paid in his defense. (CP 11-12).

[3] After the arbiter rendered a decision, the Defendant filed a notice of appeal which was at first rejected by the Arbitration Department (CP 192). Thereafter, upon Johnson' motion to reinstate the appeal, the trial court (Judge Doerty) granted the motion (in part) and reinstated the appeal, retro-dating it to the date the appeal was initially filed with the arbitration department and originally denied. (CP 321-323, Order of J. Doerty, 5/19/09). At the hearing on reinstatement of the appeal, the trial court also denied Plaintiff's first 41(a) Motion to Dismiss without prejudice (CP 321-323) which was therefore subsequently brought anew, and then subsequently granted. While Plaintiff would assert that the first Motion to Dismiss was made prior to the reinstatement of the appeal from arbitration, thereby making the second Motion to Dismiss ripe as coming after the reinstatement, this issue is mooted by compliance with King County Local Rule 7(b)(7) which provides a process for renewing a motion and which was not set forth as a basis of Johnson's appeal. . In addition, as a general principle, one judge of a trial court ruling on a matter is not bound by a prior ruling in the same case by another judge of the court; the second judge, in his discretion, may ordinarily consider the matter de novo." *State v. Frazier,* 298 Md. 422, 449, 470 A.2d 1269 (1984) As a result, the Defendant/Respondent's "Verbatim Report" is made irrelevant to the present appeal (as it is the report of proceedings from Judge Doerty's earlier denial of the Motion to Dismiss which was replaced and mooted by Judge Bradshaw's latter Order). Because the Order of Judge Doerty is not being appealed, the Verbatim Report from that hearing is not relevant and should be stricken.

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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

As the Court considers this appeal, it is also important to remember that while Johnson had filed an Answer (and then an Amended Answer), at no time during the course of this litigation did she raise any counterclaims nor did she pay the required fee necessary to assert the counterclaims. (See CP 8-10, Answer and CP 13-16 Amended Answer – both failing to include any reference to RCW 4.24.510 – a defense which, despite any referenced law or congressional findings, she now alleges somehow overcomes CR 41(a) and requires reversal of the trial court.)

Johnson cannot dispute these facts, nor can she support her malicious and bad faith attempt to prosecute Filion as protected activity of a public interest under the anti-SLAPP statute.

In responding to this Appeal, Filion asserts that because no counterclaim had been filed, he had the right to voluntary dismiss his complaint without costs assessed against either party. Filion also alleges that Johnson is not an aggrieved party under RAP 3.1, and therefore lacks standing to prosecute this appeal. Filion next argues that Johnson lacks a lawful basis to appeal the trial court's earlier denial of her motion for summary judgment. Finally, Filion asserts that the anti-SLAPP statute was never intended to apply to, and does not apply to situations of bad faith malicious prosecution and negligent infliction of emotional stress.



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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

Thus, the Court of Appeals should affirm the trial court and deny Johnson's appeal.

## II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by Julie Johnson, Appellant, is that the trial court erred in dismissing Plaintiff's claims against Johnson under the mandatory dismissal provisions of CR 41(a)(1)(B).

Civil Rule 41(a) clearly governs a Plaintiff's right to voluntarily dismiss his lawsuit at any time before he rests (so long as no counterclaims have been asserted by the opposing party). Johnson can cite no authority to the contrary. Thus, the law is clear that Filion's 41(a)(1)(B) motion to dismiss did in fact mandate dismissal (which is exactly what the trial court ordered).

It is also undisputed that no counterclaims were asserted in the Answer (nor Amended Answer) nor was the statutorily required fee paid. (CP 8-10; CP13-16 and RCW 36.18.020(2)(a)). Johnson boldly asserts on page 8 of the Appellant's Opening Brief that she:

> [F]ully and adequately pleaded her claim for an award of expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510. That the claim was not 'pleaded' within a document labeled 'answer' is of no moment in this case.

However, that is not the law, or the civil rule, and Appellant Johnson fails to cite any authority for such a proposition.



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

CR 41(a)(3) allows a defendant to object to a plaintiff's motion for dismissal only "if a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal." Under RCW 36.18.020(2)(a), any party filing a counterclaim in any civil action is required to pay a fee of $200 at the time the document is filed. The docket shows no record of counterclaims (or even an affirmative defenses made by Johnson) alleging some independent basis of a claim against Filion. There is also no evidence that Johnson ever paid the required fee to file a counterclaim.

Thus, the fact that Johnson has not pleaded her claim within a document labeled answer is absolutely pertinent to this case – as it means that the Defendant/Appellant did not have standing or other basis to object to Plaintiff's CR 41(a)(3) motion to dismiss. Had she simply plead the statute and paid the filing fee, Johnson would have had grounds to oppose dismissal of Plaintiff's complaint; but she did not.

### A. Appellant Julie Johnson is Not an Aggrieved Party

Johnson is not an aggrieved party under RAP 3.1 and does not have Standing to maintain this appeal. RAP 3.1 states that "only an aggrieved party may seek review by the appellate court." An aggrieved party is one whose proprietary, pecuniary, or personal rights are



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

substantially affected. *Cooper v. City of Tacoma*, 47 Wash.App. 315, 316, 734 P.2d 541 (1987). In her Appellant's Brief, at page 7, Johnson tries to set forth a basis as an "aggrieved party", but fails to do so. Johnson fails to cite to the record how her proprietary, pecuniary or personal rights have been substantially affected. In addition, Johnson's brief fails to cite to the record to evidence the "substantial litigation costs, expenses and attorney fees" that she alleges to have incurred, since there was no such evidence presented to the trial court (instead, we asked to assume that such may be the case).

Also, nowhere is there any authority cited which supports her argument that the defense of an action (which has been voluntarily dismissed) makes a party an aggrieved party. Such a rule would swallow RAP 3.1 since every defendant following every CR 41 motion would be an alleged aggrieved party. Thus, RAP 3.1 itself would act to bar CR 41 dismissals and act as a bar to lawsuits in itself.

More particularly, because Johnson failed to plead a counterclaim and failed to pay for that counterclaim (as required by RCW 36.18.020(2)(a)) she cannot state that her claims have not been adjudicated because she does not have any claims.

Instead of an aggrieved party, Johnson is a vengeful one, refusing to let go of an issue that she caused in the first place when she telephoned



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

the police to file a report against Filion when he arrived to pick up the last of his personal property from the marital home (at a time specifically pre-arranged agreed to by the Parties' attorneys). (See CP 11-12, Amended Complaint and Appellant's Opening Brief, page 3)

### B. The Trial Court's Order of Dismissal Pursuant to (Plaintiff/Respondent) Gary Filion's 41(a)(1)(B) Motion to Dismiss was mandatory and should be sustained.

Johnson cites no authority whatsoever, not even a single case, which contradicts the plain and unambiguous language of Civil Rule 41(a)(1)(B), which the lower court relied upon in granting Filion's Motion to Dismiss his Complaint without prejudice. Without any legal authority cited as a basis for overturning a trial court's dismissal of a complaint pursuant to Civil Rule 41(a), this appeal is without merit and the trial court should be affirmed.

Filion's Motion to the trial court to dismiss the Complaint was made pursuant to CR 41(a)(1)(B), which provides in pertinent part:

> **RULE 41. DISMISSAL OF ACTIONS**
>
> **(a) Voluntary Dismissal.**
>
> (1) *Mandatory*. Subject to the provisions of rules 23(e) and 23.1, any action **shall** be dismissed by the court:
>
> (B) By Plaintiff Before Resting. Upon motion of the plaintiff **at any time before Plaintiff rests** at the conclusion of his opening case.



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

(Emphasis added).

As Filion's case had not yet proceeded to trial (and he had not rested after opening); dismissal of this action under CR 41(a), at Plaintiff's request, was mandatory.[4] *King County Council v. King County Personnel Bd.*, 43 Wn.App. 317, 716 P.2d 322 (1986) (a plaintiff has an absolute right to dismiss his case prior to resting, unless a counterclaim has been pled by the defendant); *see also Polello v. Knapp*, 68 Wn. Ap. 809, 847 P.2d 20 (1993). Since no counterclaim had been pled by the Johnson, Filion's right to dismiss was absolute.

Johnson's claim for fees as the allegedly prevailing party is also misplaced. *Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital, a Washington Corporation v. Deanna D. Kraft* is illustrative on this issue. 165 Wash.2d 481, 200 P.3d 683 (2009) In *Wachovia*, a creditor brought a deficiency action against a debtor's wife after foreclosure of a promissory note secured by a deed of trust on debtor's and wife's home. *Id.*

[4] While the Defendant has attempted to assert that the Plaintiff had proceeded to trial (because an arbitration was had), this is clearly not the case, as an arbitration is not a trial and Defendant cites no authority upon which to base her position that an arbitration and a trial are tantamount to one another. Filion also disagrees with Johnson's contention that the arbitral award favored Johnson (as noted by Johnson on page 8 of Appellant's Opening Brief). The award is sealed pursuant to MAR 7.2 and it is improper for Johnson to try and use the award in this instance to further her claims. Should the Court take into consideration the award, then the Arbitration Award itself should be unsealed, revealing quite unsavory character findings of Johnson by the arbiter.

In addition, because the Request for Trial De Novo was made (CP 191-218), the case proceeds anew as if no arbitration had ever been had and therefore no "resting" has ever occurred. MAR 7.2(b)



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

*at 485.* After the creditor's motion for summary judgment was denied, the creditor subsequently moved the court to dismiss the complaint without prejudice pursuant to CR 41(a)(1)(B). *Id. at 486.* The court dismissed the complaint without prejudice over the wife's objections and declined to award attorney's fees and costs to either party. *Id. at 486.* On appeal to the Supreme Court, the wife alleged that the statute of limitations had run on the claim and therefore, the claim should have been dismissed with prejudice. *Id. at 487.* The Wachovia Court held that the wife failed to establish that the statute of limitations had run and therefore, the lower court's dismissal of the action without prejudice was proper. *Id. at 487 and 488.* Also at issue on appeal to the Supreme Court was whether the wife was entitled to attorney's fees and costs pursuant to a Washington statute that awarded attorney's fees and costs to the "prevailing party." *Id. at 488.* The statute further stated that a "prevailing party" means the party in whose favor final judgment is rendered. *Id. at 489.* The Court held that a voluntary dismissal leaves the parties as if the action had never been brought. *Id. at 492.* The Court also held that the creditor's dismissal without prejudice was not a "final judgment" which would make the wife the prevailing party thereby entitling her to fees and costs under the statute. *Id. at 494* (emphasis added).



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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

In the present Appeal, no argument was made by Johnson to the trial court (or in Johnson's brief on appeal) that the statute of limitations has run. Therefore, Johnson is precluded from arguing that the case should be dismissed with prejudice as opposed to without prejudice. And, more importantly, Johnson failed to assert a counterclaim or affirmative defense that would provide for an award of attorney or statutory fees even if there was a prevailing party (i.e. a dismissal with prejudice). Simply alleging that it was raised in a CR 12(b)(6) Motion or in mandatory arbitration proceedings does not somehow magically convert it to a counterclaim (and thus, override both the requirement of an actual counterclaim plead in an answer, and paying the requisite filing fee (as required by statute). Because she failed to do these things, Johnson lacks standing to assert that 41(a)(3) prevented dismissal (since no counterclaim existed).

CR 41(a) also does not provide that dismissal cannot be had where an affirmative defense exists (if one did, though here, the alleged anti-SLAPP defense was not pleaded). Otherwise, this would defeat nearly every dismissal, since affirmative defenses are routinely, and perhaps generically, pleaded by Defendants.

Because Filion moved to voluntarily withdraw his Complaint and the Court granted that request, there is no other relief that could be provided to Johnson. Her argument that the result is 'not fair' or that she



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

should entitled to payment of attorney fees is simply not properly before this Court on appeal.[5]

## III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by Johnson, ironically, is that the trial court erred in denying Johnson's own motion to dismiss, albeit one under CR 12(b)(6) which was heard as a motion for summary judgment on November 21, 2008. (CP__ Notice of Appeal). Filion, however, challenges Johnson's standing to raise this issue on appeal, and to the extent the concepts co-existent here, the appealability of this Order on subject matter jurisdiction grounds. In addition, Filion challenges Johnson's contention that she has the defense of absolute immunity accorded by RCW 4.24.500 - .510. Finally, Johnson would assert that material facts remain such as to preclude summary judgment.[6]

### A. Subject Matter Jurisdiction

For the present appeal, only two possible bases of jurisdiction for the Court of Appeals appear to exist: appeals as a matter of right and those for which discretionary review may be granted. RAP 2.1(a). An order

[5] But policy-wise, what isn't fair is the cost incurred by Filion in defending the criminal prosecution brought in bad faith by his ex-wife followed by the costs he incurred in the present civil suit (and this appeal due to his ex-wife's refusal to just let this issue go).

[6] And, even if the Court could consider Appellants second assignment of error, the issue of attorney's fees (and not the statutory penalty) would be the only issue at stake, since the corollary issue of the statutory penalty requires a specific finding that Johnson did not act in bad faith, and that issue has been mooted by the failure of Johnson to file a counterclaim (to keep that issue independently alive) together with Filion's CR 41(a) motion to dismiss.



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

denying a motion for summary judgment is not one of the orders or decisions listed in RAP 2.2(a) from which an appeal as of right exists. In fact, it is generally recognized that not only is the "[d]enial of a motion for summary judgment...generally not an appealable order under RAP 2.2(a), [but] discretionary review of such orders is not ordinarily granted." *Sea-Pac Co. v. United Food & Commercial Workers Local Union* 44, 103 Wash.2d 800, 801-02, 699 P.2d 217 (1985);[7] *Zimny v. Lovric,* 59 Wash.App. 737, 740, 801 P.2d 259 (1990) (Denial of a summary judgment motion is neither appealable nor final).[8]

Because Johnson has failed to cite a single basis for subject matter jurisdiction and appealability of the order denying summary judgment (CP188), and also because none is present, the second alleged ground for this appeal does not exist. Without setting forth a basis for subject matter jurisdiction for the appeal of the interlocutory order in her Appellant Brief,

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[7] And Appellant did not assert or argue that, pursuant to RAP 2.3(b)(1), discretionary review should be granted where "the superior court has committed an obvious error which would render further proceedings useless.... "

[8] Other State Courts take the same position. See e.g. *Taylor Constr. Co. v. Hilton Hotels,* 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (no appeal from an order denying summary judgment); *Ohio Civil Serv. Employees Ass'n v. Moritz,* 39 Ohio App.3d 132, 529 N.E.2d 1290 (1987) (the court held that federal procedural law is not binding on the Ohio courts and refused to review an order denying summary judgment because it was not an appealable order under state law); *Samuel v. Stevedoring Servs.*, 24 Cal.App.4th 414, 29 Cal.Rptr.2d 420, 423 (1994) (The court noted that no appeal of right from a pretrial immunity ruling is available under California law, and rejected the argument that the federal supremacy clause requires state courts to follow the federal immediate appeal rule.)



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

Johnson has failed to set forth a basis for review under RAP 4.1(a) and Title 2.

This position is further supported by the nature of voluntary dismissals under CR 41(a)(1), which serve to act as if the action was not brought in the first place. *Wachovia, supra, at 492.*

Although no Washington cases were found which directly address the impact CR 41(a) dismissals have on prior orders (prior orders denying motions for summary judgment), other state courts which have addressed this issue have held that orders granting voluntary dismissal under CR 41(a) render prior orders denying motions for summary judgment moot, dissolved, or otherwise incapable of review.

In Ohio, for example, the Court of Appeals wrote,

> [O]n November 14, 2006, the parties stipulated to voluntary dismissals of all remaining claims, including appellants' claim for promissory estoppel, pursuant to Civ.R. 41(A)(1). A voluntary dismissal divests a trial court of jurisdiction over an action, and a claim so dismissed is treated as if it had never been filed. *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 95, 11 OBR 396, 464 N.E.2d 142. Moreover, a voluntary dismissal without prejudice dissolves interlocutory orders made by the court in that action. *Capitol Mtge. Serv., Inc. v. Hummel,* Franklin App. No. 01AP-1104, 2002-Ohio-4301, 2002 WL 1935252, at ¶ 52; *Nielsen v. Firelands Rural Elec. Coop., Inc.*(1997), 123 Ohio App.3d 104, 106, 703 N.E.2d 807. Accordingly, an appellate court lacks jurisdiction to review a trial court's denial of summary judgment on a claim that was subsequently voluntarily dismissed. See *Lilly v. Bradford Invest. Co.,* Franklin App. No. 06AP-1227, 2007-Ohio-2791, 2007 WL 1640850, at ¶ 18; *Gilbert v. WNIR 100 FM (2001),* 142 Ohio App.3d 725, 747,



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

> 756 N.E.2d 1263. Here, the voluntary dismissal of all remaining claims dissolved the portion of the trial court's interlocutory order denying summary judgment on appellants' promissory - estoppel claim, leaving nothing for this court to review on appeal. **Thus, we find appellees' second cross-assignment of error to be moot, and we overrule it.**

*Kellie Auto Sales, Inc. v. Rahbars & Ritters Ents., L.L.C.*, 876 N.E.2d 1014 Pg 1025 (Ohio App. 10 Dist. 2007) (emphasis added). The same "no suit filed" doctrine after CR 41(a)(1) dismissals has been adopted by the appellate courts in North Carolina. "It is well established that once a plaintiff files a voluntary dismissal under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, 'it [is] as if the suit had never been filed.'" *Barham v. Hawk*, 600 S.E.2d 1, 8 (N.C.App. 2004). And, "the dismissal 'carries down with it previous rulings and orders in the case.'" *Gibbs v. Carolina Power & Light Co.,* 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965) (*quoting* 11 A.L.R.2d 1407, 1411)

Finally, Johnson's failure to raise (or pay for) a counterclaim in her original Answer (and Amended Answer) coupled with her failure to plead an affirmative defense provides her with no grounds on which to assert an error of law in the first place. And, because the Court's Order did not set forth the bases of denial and Johnson did not bring forth a verbatim report of that particular hearing, the environment for reviewing the Court's



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

interlocutory order does not lend itself capable of review by the Court of Appeals.

**B. Standing**

Johnson did not seek an appeal from the order denying summary judgment ***prior*** to the Order Granting Plaintiff's Motion for 41(a) Dismissal (CP 395-396) and thus, the prior order has been rendered moot by Filion's voluntary dismissal. *Cf. Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25, 87 S.Ct. 193, 195, 17 L.Ed.2d 23 (1966) (The denial of summary judgment is not appealable when entered as an interlocutory order). Johnson also is not an aggrieved party under RAP 3.1 (as set forth below).

**C. The Defense of Absolute Immunity Afforded by RCW 4.24.500 - 510, the anti-SLAPP statute, does not apply.**

Even though she did not raise RCW 4.24.500 et seq as an affirmative defense nor as a counterclaim in the action below (and did not pay the required counterclaim filing fee) and even though she does not have standing to challenge the order denying summary judgment, if the Court were somehow to allow Johnson to raise that defense here and challenge the trial court's previous ruling, then, even in that case, her request for relief should fail as she is not entitled to the relief sought.



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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

Johnson contends that she is entitled to the benefits of the defense of absolute immunity accorded by RCW 4.24.500 -.510. Filion on the other hand, asserts that RCW 4.24.500 does not apply to: a) matters that do not involve substantive issues of public concern;[9] nor, b) causes of for malicious prosecution; nor c) causes of action for negligent infliction of emotional distress; but d) even if it did, that RCW 4.24.500 et seq cannot be used in bad faith.[10]

**1) RCW 4.24.500-510 applies only in situations involving a substantive issue of public concern and to matters reasonably of concern to the agency**

In *Right-Price Recreation v. Connells Prairie,* the Washington State Supreme Court stated that "the anti-SLAPP statute applies when a communication to influence a governmental action results "in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations . . . on (c) a substantive issue of some public interest or social significance." 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (quoting George W. Pring & Penelope Canan, SLAPPS: *Getting Sued For Speaking Out* 8-9 (1996)).

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[9] Especially in cases where the action is between too contentious litigants in a divorce case, and centered over two competing clauses in a divorce decree resulting in a malicious attempt by one litigant to punish the other.

[10] Johnson is not entitled to its protections since Johnson called the police with knowledge that Filion was not in violation of a criminal law, and therefore, Johnson's reporting was made with in bad faith.



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

In countenance to this support, and in an effort to support her "absolute immunity" defense, Johnson relies on *Dang v. Ehredt*. 95 Wn. App. 670, 977 P.3d 29, *review denied.* 139 Wn.2d 1012 (1999). In *Dang*, bank employees contacted police to report that Ms. Dang was attempting to pass a counterfeit check. Dang, alleging that the bank made a mistake, sued the bank under a number of different theories.

Although both *Dang* and the present situation involve a civil complaint filed against a nongovernmental individual or organization (there, the bank and here an ex wife), *Dang* is distinguishable because the communication in *Dang* was in regards to a substantive issue of public interest or social significance (i.e. calling the police to report an attempt to pass a counterfeit check at a bank). It is, however, quite another matter to hold that a substantive issue of public interest exists where an ex-wife calls the police to report what is in actuality an incomplete and even maliciously false statement made by the wife against her ex-husband in an attempt to use the police to get back at the husband (where the divorce decree provided for the exchange and where the Parties' attorneys had agreed in writing as to the exchange time/date, where it was the last day the house would be in the possession of the Parties and where the ex-wife was supposed to have already been moved out). (CP 165-175)



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

It is also Filion's position that malicious prosecution cases are themselves not matters of public concern. *Banks v. Nordstrom, Inc.,* 57 Wash.App. 251, 264, 787 P.2d 953, *review denied,* 115 Wash.2d 1008, 797 P.2d 511 (1990) (considering the fifth prong of the CPA and matters affecting the public interest, and holding that malicious prosecutions themselves do not satisfy that fifth prong).

And, if Appellant Johnson can raise the anti-SLAPP statute, then all divorce litigants would be emboldened to use it at every step of the litigation (even if it meant fabricating stories for the benefit of the civil litigation and possible anti-SLAPP defense, since there would be no check on such conduct) – ranging from alleged restraining order violations, to reporting alleged child endangerment issues to Child Protective Services, to reporting parenting plan violations to Family Court Services. And, even here, Filion should have pre-empted Johnson's call to the police by calling the police when Johnson refused to allow him access. Would the rule then be the first person to call the police is the person afforded immunity? Of course, the stakes would be high with attorney fees and a statutory lever at issue – leaving former couples ammunition to do battle over the application of anti-SLAPP actions to their divorce decrees.

Holding that anti-SLAPP immunity applies to actions relating to divorce decrees (under these facts and in this situation) could also escalate



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

the application of anti-SLAPP in private vendettas in other areas of law, such as disputes between neighbors and landlord/tenants. In *Hoffman v. Davenport-Metcalf*, the Rhode Island Supreme Court stated that it was not convinced that the provisions of its anti-SLAPP statute should apply to a private matter between tenants against their property manager and property management company. 851 A.2d 1083, 1088 (2004). (Court was not "persuaded that these are the types of activities that the Legislature intended to protect in enacting the law, and we decline to extend the purview of the anti-SLAPP statute to encompass these private causes of action and criminal complaints.").

The communication to the police agency, and the resulting decision by the prosecuting attorney's office to drop the criminal complaint demonstrate that this was something that was not reasonably of concern to the agency and therefore outside the purview of RCW 4.24.510. And this consideration should form a part of a new formula regarding application of this statute with respect to, at least, the good faith standard.

In the end, there has to be some limit to what is a matter of public concern or of concern to an agency, and Filion would posit that this limit is found in this case, on these facts, and in this private matter between two contentious divorce litigants seeking retribution against one another.



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

**2. The anti-SLAPP statute does not apply to claims of negligence infliction of emotional distress**

In his Amended Complaint (CP 11-12), Filion sets forth "emotional distress" and "negligence misrepresentation" as claims against Johnson. In her brief, Johnson failed to address which claims she believed were barred by RCW 4.24.500-510. Instead, she asserts that all of Filion's claims against her are barred by the anti-SLAPP statute. She is incorrect.

The anti-SLAPP statute does not provide immunity for non-communicative activities, such as negligent infliction of emotional distress. *See Gontmakher v. City of Bellevue*, 120 Wn.App. 365, 372, 85 P.3d 926 (2004).

Because Johnson did not address this in her brief, it is not further addressed here. But, notwithstanding any other decision by the Court, if this case were remanded in any part and Filion were forced to litigate these claims, his claim for negligent infliction of emotional distress would remain (no matter how in artfully pleaded).

**3. The anti-SLAPP statute does not provide absolute immunity against malicious prosecution actions.**

In this case, of course, the underlying action was based, inter alia, on malicious prosecution relating to Johnson's efforts to have Filion charged with violation of a restraining order after he arrived at the marital



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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

home at a pre-arranged time and date to pick up his remaining personal property – a date that had been pre-arranged by the Parties' attorneys in accordance with the divorce decree and on the last day before the selling of the house. (CP 1-4; CP 19-28, Ex. A Decl. of M. Olson). Actions for malicious prosecution are not precluded by RCW 4.24.500-510 because there is no such specific intent in the legislation and the statute was never intended to do away with this common law action. See *Lumberman's of Washington, Inc. v. Barnhardt,* 89 Wash.App. 283, 286, 949 P.2d 382 (1997) (Statutes enacted in derogation of the common law are to be strictly construed absent legislative intent to the contrary).

In addition to the absence of a specific intent to do away with malicious prosecution actions (which would be the result of the holding Johnson seeks), the very case upon which Johnson relies, *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.3d 29, *review denied.* 139 Wn.2d 1012 (1999), runs contrary to Johnson's position. *Dang* cites and relies on California law – law which in turn specifically excludes malicious prosecution actions from anti-SLAPP immunity.[11]

[11] In reviewing RCW 4.24.510, the court of appeals in *Dang v. Ehredt* relied on *Devis v. Bank of America*, 65 Cal.App.4th 1002, 77 Cal.Rptr.2d 238 (1998) and *Hunsucker v. Sunnyvale Hilton Inn* 23 Cal.App.4th 1498, 28 Cal.Rptr.2d 722 (1994)[11]. Both *Hunsucker* and *Devis* in turn cite the California Supreme Court case, *Silberg v. Anderson.* 50 Cal.3d 205, 786 P.2d 365 (1990).



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801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

In *Silberg*, 50 Cal.3d 205, 786 P.2d 365 (1990), the California Supreme Court made it clear that while the privilege afforded by the immunity statute is far reaching, extending to tort actions, **it does not bar** claims for malicious prosecution. *Id.* at 215-216. *Silberg* cited the reasoning of the California Supreme Court in *Albertson v. Raboff*, 46 Cal.2d 375 (1956), as to why malicious prosecution actions are not barred by the anti-SLAPP act. In *Albertson*, the court distinguished between actions for defamation and those for malicious prosecution.

> [T]he fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.

46 Cal.2d at 382. The Albertson court went on to write that "allegations that the action was prosecuted with knowledge of the falsity of the claim are sufficient statement of lack of probable cause" in malicious prosecution actions. *Id.*

This is the same reasoning that Filion requests the Court apply here.



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801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

Although no Washington appellate cases from Division One appear to directly address whether the immunity afforded by RCW 4.24.500 -.510 applies to malicious prosecution, the Court of Appeals, Division Two, has addressed this issue in the converse in *Segaline v. Dep't of Labor & Indus.* 182 P.3d 480, 487 (2008). The Segaline court's held that malicious prosecution claims do fall under RCW 4.24.510's immunity. *Segaline* 144 Wash.App. at 325. However, the Court also stated that the trial court's dismissal of Segaline's claims was proper because Segaline failed to raise an issue of material fact regarding the Defendant's immunity. *Segaline* 144 Wash.App. at 325.

Here, while Filion asserts that *Segaline's* reasoning is specious, the Segaline court also fails to recognize that the cases that it cites in support of its vague reasoning, *Dang and Devis v. Bank of America,* in turn rely on California law which exempts malicious prosecution suits from anti-SLAPP's absolute immunity. Thus, Segaline's stand alone position is without any case law support.

Because the *Segaline* court made reference to RCW 4.24.500-510 without any analysis, and because there is no clear intent from the legislature to bar malicious prosecution claims, this Court should decline



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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

to follow Division Two's unintentionally sweeping statement in *Segaline.*[12]

### 4. Johnson's Bad Faith Conduct Bars Absolute Immunity

Even if the Court decides that RCW 4.24.510 applies to malicious prosecution, the statute does not grant an absolute immunity unless the police reporting was made in good faith (something that was not present in the instant case).

> [W]here a defendant in a defamation action claims immunity under RCW 4.24.510 on the ground his or her communications to a public officer were made in good faith, the burden is on the defamed party to show by clear and convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.

*Segaline,* 182 P.3d at 487

This is in accord with the statute itself (4.24.500-510) which only protects communications made to governmental agencies that are

[12] As in *Skimming*, the *Segaline's* statement regarding malicious prosecution was "made without analysis, and the conclusion is not central to the court's holding" and thus, Division One should not apply RCW 4.24.510 to malicious prosecution. *Gontmakher*, 120 Wn. App. at 373. See also *Gontmakher v. City of Bellevue*, 120 Wn.App. 365, 85 P.3d 926 (2004) (Division One declined to follow the dicta in *Skimming v. Boxer,* 119 Wash.App. 748, 82 P.3d 707 (2004), a Division Three decision, when it addressed the issue of whether a governmental entity is a "person" under RCW 4.24.510). *Segaline's* statement regarding malicious prosecution was "made without analysis, and the conclusion is not central to the court's holding" and thus, Division One should not apply RCW 4.24.510 to malicious prosecution.



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801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

reasonably of concern to that agency. *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 372, 85 P.3d 926 (2004).

And it makes no sense to grant attorney fees to the Defendant where bad faith is involved but leave the issue of bad faith and the statutory penalty to the jury to decide. The issue of bad faith, as the Segaline court recognized, must apply across the board to RCW 4.24.500 and the Plaintiff must be provided the opportunity to show by clear and convincing evidence that the report to the police was made in bad faith. Accord to *Gilman v. MacDonald*, 74 Wash. App. 733, 738-739, 875 P.2d 697 (1994).

Although the legislature may have believed that it had valid reasons for removing the good faith language from the Washington anti-SLAPP statute in 2002, the statute would be unconstitutional under the First Amendment unless a good faith requirement is read into the statute. This is because the statute chills a plaintiff's First Amendment Right by denying him access to the court by blindly dismissing a valid claim without first addressing whether there is a question of fact regarding good faith. One way to reconcile the constitutional rights of the Parties with the statutory intent to hold that the removal of the "good faith" requirement from RCW 4.24.500-510 in 2002 caused the burden to shift to the Plaintiff to prove that the Defendant made the report to a government



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authority in bad faith (i.e. knew falsity of the statements or acted with reckless disregard). *See Gilman v. MacDonald, 74 Wn.App.* 733, 738-39, 875 P.2d 697, *review denied*, 125 Wn.2d 1010 (1994); and *Segaline, supra.*

The right of citizens to contact the government to seek help must be qualified with a good faith requirement and without it, cannot be granted an absolute immunity. If an absolute immunity applies without the requirement of good faith, then the right to free speech is made superior to the right to petition, despite neither constitutional right being pre-eminent over the other. See *McDonald v. Smith,* 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed.2d 384 (1985) (the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment); *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights ... and therefore are united in the First Article's assurance.")

The Washington anti-SLAPP statute was fashioned to protect the free speech of citizens and small groups without fear of retaliation through the legal system from more powerful entities and for this reason, the



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Seattle WA 98104
206-709-8281
Fax 206-860-0178

legislature removed the good faith language. Without the good faith language, however, bad faith reports that do not touch upon public concerns, such as that of Johnson, would be afforded absolute immunity and plaintiffs, such as Filion, would be unable to petition the court for redress for wrongs made against him in bad faith (i.e., unprotected speech). Thus, if one does not exist across the board, the Court should read a good faith requirement into the Washington anti-SLAPP statute to avoid this chilling effect.

Johnson should also be equitably estopped from raising RCW4.24.500-510 since she Filion relied on her lawyer's written agreement to have Filion come to the former marital home to pick up his personal property. Filion relied in good faith on a statement by Johnson (through her attorney) which she later repudiated. *Wilson v. Westinghouse Elec. Corp.*, 85 Wash.2d 78, 81, 530 P.2nd 298 (1975). Thus, application of equitable estoppel to bar Johnson's attempted utility would be appropriate. In effect, Johnson used her statements to entrap Filion (which Filion justifiably relied on as he had no other choice), and after repudiating that agreement/statement, is now utilizing RCW 4.24.500 as a sword to bludgeon him in an attempt to obtain her fees and statutory award.



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Outside of constitutional and policy reasons why these types of actions should not fall under RCW 4.24.500 (and why the Court could affirm the trial court as a matter of law) there exists numerous factual reasons why Johnson's communication to the police was not in good faith, such as Johnson being aware that Filion was scheduled to arrive at their marital home at that date and time to pick up his remaining personal property, and that the date and time had been extensively pre-arranged and agreed to through both Parties' attorneys. (CP 1-4; CP 19-28). And, the agreed upon date for the property pick up was the last day before the house sold. (CP 1-4, 19-28, Ex. A Decl. of M. Olson). These facts and the issue of bad faith are addressed next.

**D. Material Facts Exist that Preclude Johnson from Being Awarded Summary Judgment as a Matter of Law under CR 12(b)(6)**

Johnson's CR 12(b)(6) motion to dismiss was heard by the court as a motion for summary judgment under CR 56. (See pg 4, Appellant's Brief) Under CR 56(c), "summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Right-Price Recreation, IIC v. Connells Prairie Community Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Here, the trial court denied Johnson's motion to dismiss.



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Although the trial court did not provide an explanation for its denial of the motion to dismiss, it is clear that there are material facts at issue or that the material facts weighed in Filion's favor. Johnson even admits on page 13 of Appellant's Opening Brief that there is a question of fact regarding whether Johnson's citizen's complaint was communicated to the police in bad faith. In addition, there is also a question of material fact as to whether Johnson had probable cause or acted with malice when she erroneously communicated to the police that Filion had violated the restraining order. And, there is the question as to whether or not Filion committed an "illegal act" or engaged in "potential wrongdoing" that was of reasonable concern to the police agency such as bring the statute into play, especially where the police later drop the criminal complaint, thereby bringing forth the claim for malicious prosecution.[13]

The information that Defendant Johnson communicated to the police officers was made in bad faith when she neglected to tell the police that the reason for Filion's appearance at the house at the time was due to the representation that she herself had made to Filion (through the Parties' lawyers), and that she was not to be present. She also did not tell the

[13] This is also another reason why the Court could decide that Filion's acts do not give rise to the immunity afforded by RCW 4.24.500 (since Filion was engaged in a consensual act between the parties and not engaged in any wrongdoing. *See Gontmakher v. City of Bellevue*, 120 Wash.App. 365, 366, 85 P.3d 926 (2004).



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Seattle WA 98104
206-709-8281
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police of the separate divorce decree provision requiring Filion to collect this personal property.

Johnson knew of the incompleteness of her communication to the police and thus its falsity. The question of whether Defendant Johnson made the communication in good (or bad) faith is a disputed question of fact.

In a malicious prosecution action, the Plaintiff must show a lack of probable cause.

A malicious prosecution claim arising from a criminal action in common law requires the plaintiff to prove the following elements:

> (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

*Clark v. Baines*, 150 Wn.2d 905, 911, 84 P.3d 245 (2004).

This requirement aligns itself well with the good faith requirement of RCW 4.24.500. In proving a want of probable cause, a Plaintiff in a



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Fax 206-860-0178

malicious prosecution action would also disprove "good faith" by the Defendant under the anti-SLAPP statute.[14]

And when evidence presented fails to prove the elements necessary to allow the application of RCW 4.24.510, the basis for awarding attorney fees or statutory damages do not exist. *Trummel v. Mitchell*, 156 Wn.2d 653, 676-77, 131 P.3d 305 (2006). The trial court denied Johnson's Motion and with it, denied any finding that Johnson had proven her alleged affirmative defense.

## IV. ISSUE OF ATTORNEY'S FEES

RCW 4.24.510 provides that an award of attorney fees and statutory damages is allowed only to a party who prevails on the particular defense. Johnson has not prevailed on this Defense and thus even if she was successful on appeal, she is not entitled to attorney's fees. In

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[14] However, there would still exist the question for the Court (as addressed above, as to whether or not the anti-SLAPP statute should apply to purely private matters between divorce litigants, especially in light of the passage below.

> The necessary facts to establish probable cause constitute a question of law to be decided by the court; whether these facts exist in a given case is a question for the jury.

*Carr v. Zellerbach Paper Co.*, 169 Wash. 493, 497, 14 P.2d 35 (1932).
As a result, it would be unwarranted for a judge to dismiss a case early through the application of the anti-SLAPP statute (despite any intent from the legislature to the contrary) when there is clearly a question of whether the facts are sufficient to establish probable cause. Thus, another policy reason for exempting malicious prosecution from the immunity afforded by the anti-SLAPP statute is present (i.e. so that there is no conflict between the purpose of the anti-SLAPP legislation and common law malicious prosecution).



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Fax 206-860-0178

addition, as a general rule, a voluntary dismissal will not result in there being a prevailing party to whom costs or attorney fees may be awarded. 14KA Karl B. Tegland, Washington Practice: Civil Procedure §36.8, at 524-25 (1st ed. 2003 & Supp. 2007, at 83).

Filion, on the other hand, asserts that he is entitled to attorney's fees under RAP 18.9 because of the frivolous nature of this appeal. This request for fees is premised on at least the following arguments made by Johnson:

1) First, and though asserting this claim of error for appeal, Johnson did not provide a legal basis for arguing that a voluntary dismissal under 41(a) dismissal could be subject to reversal when she had not even pleaded a counterclaim (or even, the affirmative defense of RCW 4.24.500);
2) Second, where Johnson is not an aggrieved party and further has failed to offer evidence below of actual attorney's fees incurred;
3) Third, where there is no merit to the argument that Johnson could be a prevailing party despite the voluntary dismissal, when the case law is clear that she cannot be the prevailing party and a good faith argument for reversal of existing law has not been made);



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801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

4) Fourth, where Johnson lacks the procedural and lawful ability to appeal the trial court's earlier denial of her motion for summary judgment, and where Johnson has failed to set forth the legal grounds (or even a RAP) upon which her appeal of that order could have been based;

5) And last, where Johnson has made a request for the appellate court to award her the statutory penalty under 4.24.500-510 despite there being no basis for such a request, and where even if the appellate court had voted to reverse and reinstate the case, the issue of bad faith would be a matter triable to the jury before such an award could be made.

And, though Filion's position is that the entire appeal is frivolous, Johnson should not be permitted to bootstrap one argument that the court finds to not to be frivolous with the collection of other arguments which are wholly without merit.

## VI. CONCLUSION

In closing, based on the requirements of CR 41(a)(1)(B), the case law cited above, and the facts of this case, the Court should affirm the decision of the lower court to grant Filion's request for a CR 41(a)



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Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

voluntary dismissal of this action. Finally, the Court should award Filion his reasonable attorney's fees and costs.

DATED this 19th day of May, 2010

By _____
Noah C. Davis, WSBA#30939
Attorney for Gary Filion, Respondent
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206.709.8281



**CERTIFICATION OF SERVICE**

I hereby certify that on this 19th day of May, 2010, I mailed the foregoing document first class, postage prepaid, to appellant's counsel at the following address:

Helmut Kah, Attorney at Law
16818 140th Ave NE
Woodinville, WA 98072-9001
Attorney for Appellant

DATED this 19th Day of May, 2010

_____
Victoria Nguyen, WSBA #41883
Attorney for Respondent



IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178